83-6490

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

GARY BRADFORD CONE, Petitioner,

vs.

STATE OF TENNESSEE, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

JOHN C. DICE
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March 21, 1984

QUESTIONS PRESENTED

1. Whether the jury's erroneous finding of an aggravating circumstance should have caused reversal of the verdict? Whether the error is heightened by the fact that the Tennessee Supreme Court found, one week after the decision in the instant case, in State v. Buck (see Appendix), that a jury finding of an inapplicable aggravating circumstance negated the punishment finding. Does the divergence in the two opinions deny due process and equal protection guaranties to the Petitioner?

2. Is the petitioner denied his right to a fair trial in that the jury was "death-qualified" before the guilt portion of the bifurcated trial by exclusion of jurors who expressed an inability to consider the death penalty based on their religious beliefs, particularly in light of recent sutdies which have shown that such a jury is more likely to convict and is unfair to the defendant?

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II. The petitioner was denied his right to a fair trial in that the jury was "death-qualified" before the guilt portion of the bifurcated trial through exclusion of jurors who expressed an inability to consider the death penalty based on their religious beliefs, and that recent studies have shown that such a jury is more likely to convict and is unfair to the defendant.....7

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

GARY BRADFORD CONE,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF TENNESSEE

Petitioner Gary Bradford Cone respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Tennessee affirming his sentence of death for murder.

OPINION BELOW

The opinion of the Supreme Court of Tennessee affirming petitioner's conviction and sentence is unreported at this time. A copy of the decision is attached as Appendix A.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3). The judgment of the Supreme Court of Tennessee was entered on January 23, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ....

The Fourteenth Amendment provides in relevant part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Gary Bradford Cone was indicted for and convicted of two counts of murder in the first degree and murder in the perpetration of a felony, three counts of assault with intent to commit murder in the first degree, and one count of robbery with a deadly weapon. Trial in this case occurred in the Criminal Court of Shelby County, Tennessee with Petitioner Cone receiving two death sentences for the murders, not less than ten nor more than twenty-five years for each of the three assaults, and life for robbery with a deadly weapon. Petitioner Cone is indigent and has remained incarcerated since the time of his arrest. The Tennesse Supreme Court has scheduled an execution date for the Petitioner of June 29, 1984.

At trial, the jury voir dire began on April 12, 1982 and was completed on April 15, 1982. At least eight prospective jurors were excused for cause by the Court for expressing scruples about the death penalty; at least five of those were based on personal religious beliefs. The trial lasted from April 16, 1982 to April 23, 1982.

The penalty phase of the trial occurred on April 23, 1982, when the jury found the punishment to be death. The jury found that four aggravating circumstances were present and outweighed any mitigating circumstances:

1. The defendant was previously convicted of one or more felonies, other than the present charge, which involves the use of threat or violence to the person.

2. The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered during his act of murder.

3. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

4. The murder was committed for purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

Timely appeals were perfected and oral arguments in the Tennessee Supreme Court were conducted in November, 1983. On January 23, 1984, the Tennessee Supreme Court affirmed the convictions and the death penalties.

HOW THE FEDERAL QUESTIONS WERE PRESENTED AND DECIDED BELOW

Petitioner alleged in his Motion For New Trial that an illegal aggravating circumstance was found by the jury, but the Trial Court agreed with the State's interpretation of the statutory language. Motion For New Trial, Ground #24:

> The verdict of the jury is illegal in that the jury found that an aggravating circumstance existed under T.C.A. §39-2404, namely that the defendant knowingly created a great risk of death to two or more persons other than the victim murdered during his act of murder. Said finding is completely without merit and is not supported by the record of this cause, nor is there any evidence that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. Since a death penalty verdict must contain a finding that aggravating circumstances outweigh mitigating circumstances, and one or more of the aggravating circumstances found by the jury was clearly illegally found, the Court cannot speculate as to whether or not, had the jury properly followed the law, they would have reached the same verdict. Further, argument by the Assistant Attorney General that the defendant knowingly created a great risk of death to two or more persons other than the victims murdered during his act of murder, was improper and a further example of prosecutorial misconduct in this cause.

The issue was again raised before the Tennessee Supreme Court as Assignment of Error #1:

> The Court erred in not granting the defendant's motion for a new trial on the grounds that the jury found aggravating circumstances in the case which were clearly not supported by the proof.

Petitioner further alleged in his Motion For New Trial as Ground #3 that "the Court erred in excluding jurors from the panel who expressed views against tht death penalty in that said exclusions deprived the defendant of a trial by a 'jury of his peers.'"

The issue was raised before the Tennessee Supreme Court in Assignment of Error #9 which states that "(t)he Court erred in excusing jurors for religious reasons."

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a Writ of Certiorari to review the decision of the Tennessee Supreme Court.

I. THE JURY'S ERRONEOUS FINDING OF AN AGGRAVATING CIRCUMSTANCE SHOULD HAVE CAUSED REVERSAL OF THE VERDICT. THIS ERROR IS HEIGHTENED BY THE FACT THAT THE TENNESSEE SUPREME COURT FOUND, ONE WEEK AFTER THE DECISION IN THE INSTANT CASE, IN THE CASE OF STATE V. BUCK, THAT THE FINDING OF AN INAPPLICABLE AGGRAVATING CIRCUMSTANCE NEGATED THE PUNISHMENT FINDING. THE DIVERGENCE IN THE TWO OPINIONS DENIESDUE PROCESS AND EQUAL PROTECTION GUARANTIES TO THE PETITIONER

Four aggravating circumstances were found by the jury to be present in this case, and are listed in the section entitled "Statement of the Case." The Tennessee Supreme Court agrees with Petitioner's allegations that one of these was illegal, or was not borne out by the evidence; specifically, "the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered during his act of murder." The Supreme Court found in Mr. Cone's case that this, however, was harmless error.

In State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981), the Tennessee Supreme Court held that:

> In the case of State v. Moore, 614 S.W.2d 348 (Tenn. 1981), we found the proof insufficient to support one of two aggravating circumstances found by the jury. In that circumstance we held that it was necessry to set aside the death penalty and remand to the trial court for the purpose of conducting a new sentencing hearing. Similarly, we have no way of knowing and cannot speculate whether the jury would have imposed the death penalty with one of the two aggravating circumstances withdrawn from their consideration and with the necessity of weighing the one remaining aggravating circumstance against the mitigating circumstances.

Emphasis added.

The Court held in Cone that the number of circumstances involved distinguishes its prior findings, although no such standard was set out in Moore or Pritchett.

Then, one week after its decision in Cone, the Tennessee Supreme Court decided State v. Buck, 9 Tennessee Attorney's Memo 6-2 (January 30, 1984). The same question had been presented to

the Court, where the jury had found that three aggravating circumstances existed and one, in fact, did not. The Court not only agreed that the circumstance was illegal, it did not even attempt to draw the same "number of circumstances" distinction in Buck as it did in Cone. It went on to find that the trial judge should not have read all of the aggravating circumstances listed in the statute:

> The trial judge was in error in charging the jury in that manner. It was his duty to determine which of the aggravating circumstances had been raised by the evidence and thus submitted to the jury for its determination as to whether the State had proved beyond a reasonable doubt each aggravating circumstance so submitted....The aggravating circumstances and mitigating circumstances which were not raised by the evidence should not have been mentioned in the charge. That is the meaning of the MANDATE in T.C.A. §39-2-203(e).... Emphasis added. See page 19 of State v. Buck, attached.

As is shown by the attached jury instructions in Cone, the trial court permitted the same error as in the Buck case. The Court then goes on to quote Pritchett and Moore, supra.

It is Petitioner's contention that the Tennessee Supreme Court wanted to affirm Mr. Cone's conviction enough to blatantly ignore its own prior decisions and then disregarded findings in his case only a week later by reaching opposite results on the same Constitutional issues. Petitioner respectfully contends that because of this glaring disregard for his guaranties of due process and equal protection, this Court should grant certiorari to review the conflicting decisions of the Tennessee Supreme Court, and decide what should be the effects of illegal findings of aggravating circumstances by juries.

II. THE PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL IN THAT THE JURY WAS "DEATH-QUALIFIED" BEFORE THE GUILT PORTION OF THE BIFURCATED TRIAL THROUGH EXCLUSION OF JURORS WHO EXPRESSED AN INABILITY TO CONSIDER THE DEATH PENALTY BASED ON THEIR RELIGIOUS BELIEFS, AND THAT RECENT STUDIES HAVE SHOWN THAT SUCH A JURY IS MORE LIKELY TO CONVICT AND IS UNFAIR TO THE DEFENDANT.

At least eight jurors were excused by the Court for cause based on their testimony that under no circumstances could they impose the death penalty. At least five of these jurors stated that the reason that they could not impose the death penalty was personal religious belief. All of these people, however, stated that they would be able to listen and to render a fair decision as to the guilt or innocence of the defendant. Petitioner contends that such a jury not only does not represent a cross-section of the community, but that it is also much more likely to convict.

A decision based on such a finding was rendered in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D.Ark. 1983). An even more recent decision reaching the same conclusion was rendered in the U.S. District Court for the Western District of North Carolina, where the court "relied heavily on several recent studies of juror attitudes and stresses that empirical evidence on the shared attributes of such jurors is much more convincing now than when the Supreme Court decided Witherspoon v. Illinois, 391 U.S. 510 (1968)." Keeten v. Garrison, 34 CrL 2374 (1984). The North Carolina Court found that a fair jury was not provided when the prosecutor could keep on the jury those persons most likely to convict and exclude for cause all those most likely to acquit. The Court further held that such a jury does not, even in theory, represent a cross-section of the community. It found that separate trials should be held with respect to guilt and punishment with those objecting to the death penalty being excused only from the punishment phase. The North Carolina Court ordered habeas corpus relief for three prisoners on death row.

Petitioner respectfully contends that exclusion of the objecting jurors at the beginning of the guilt phase of the trial denies his Sixth Amendment right to a fair trial and that this Court should grant certiorari to review the decision of the Tennessee Supreme Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Tennessee.

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March 21, 1984

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

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Petitioner,

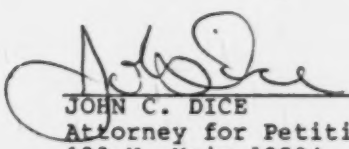
v.

STATE OF TENNESSEE,

Respondent.

PROOF OF SERVICE

I hereby certify that on this 21st day of March, 1984, one copy of the petition for writ of certiorari was mailed, postage prepaid, to William Leech, Attorney General for the State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37219, counsel for the respondent. I further certify that all parties required to be served have been served.



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IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

For Publication

January 23, 1984

STATE OF TENNESSEE,

Plaintiff-Appellee,

vs.

GARY BR[illegible]FORD CONE,

Defendant-Appellant.

Shelby Criminal
S. Ct. No. 12

Hon. James C. Beasley, Judge

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FILED
JAN 23 1984
JEWEL REDDEN, CLERK

O P I N I O N

AFFIRMED

HARBISON, J.

Appellant was convicted of murder in the first degree and murder in the perpetration of a burglary in connection with the homicides of an elderly couple, Shipley O. Todd and his wife Cleopatra Todd in Memphis on August 10, 1980. He was also convicted of three charges of assault with intent to commit murder in the first degree upon three other persons and of robbery by use of deadly force upon a fourth. All of these offenses were shown to have occurred on August 9, 1980.

We have reviewed the evidentiary record and the numerous issues presented on appeal by counsel for appellant. We find none of these issues sufficient to warrant reversal of any of the convictions, and all of them are affirmed.

Appellant was sentenced to life imprisonment for the armed robbery and for a term of years upon each of the assault charges. He was given the death penalty for each of the two murders. The record clearly warrants imposition of the death penalty under the circumstances of these homicides, and it could in no sense be deemed to be disproportionate, in our opinion.

The homicides were the climax of a series of criminal episodes commencing on August 9, 1980, when appellant robbed a jewelry store in Memphis of approximately $112,000 worth of expensive watches, rings and other jewelry. The manager of the jewelry store gave a description to the police, and an officer in an unmarked cruiser saw appellant driving his 1972 gray oldsmobile a short time after the robbery. He followed appellant at a normal speed, but the latter, apparently becoming alarmed, accelerated in an effort to escape. A high-speed chase ensued through mid-town Memphis and into a

residential neighborhood. There appellant abandoned his automobile. He shot one of the police officers who attempted to arrest him, shot a citizen, John Clark, who challenged him, and drew a gun on a third citizen, demanding that the latter give appellant his automobile. The owner of the automobile fled, and appellant snapped his pistol several times, his ammunition having been exhausted. He not only threatened the owner of the automobile, but apparently was snapping his pistol at a police helicopter which was flying over the area to assist in his apprehension. Appellant eluded police during the afternoon of August 9, a Saturday. Early on the next morning, in the same neighborhood, he appeared at the door of a resident, Lucille Tuech. When she refused him admittance to make a telephone call, he drew a pistol on her. Later that afternoon he entered the home of Mr. and Mrs. Todd, which was located a very short distance from the apartment house where Ms. Tuech lived and in the same residential area where the other shootings had occurred.

Mr. Todd was 93 years of age; his wife was 79. She had gone to church on the morning of August 10 and had returned. Apparently she had eaten a meal. At some time in the afternoon appellant entered the home, breaking a latch on the rear door. The bodies of both victims were found horribly mutilated and cruelly beaten three days later upon investigation instituted by anxious relatives. Appellant's fingerprints and hair samples were found in the home, which had been ransacked, and he apparently was able to steal enough money or other valuables from the home to fly from Memphis to Florida, where he appeared at the home of an acquaintance on August 12.

Appellant from the beginning has admitted committing

the homicides and the other crimes involved. The only defense interposed on his behalf was that of insanity, or lack of mental capacity, due to drug abuse and to stress arising out of his previous service in the Vietnamese war, some eleven years prior to the events involved in this case. This proved to be a tenuous defense, at best, since neither of the expert witnesses who testified on his behalf had ever seen or heard of him until a few weeks prior to the trial. Neither was a medical doctor or psychiatrist, and neither had purported to treat him as a patient. Their testimony that he lacked mental capacity was based purely upon his personal recitation to them of his history of military service and drug abuse. A psychiatrist and a psychologist examined him upon orders of the trial court, and neither of them found any evidence of a stress syndrome or of excessive drug abuse. Lay witnesses who saw him at or about the time of the homicides contradicted his statements to his expert witnesses as to the degree and extent of his drug abuse. The jury was clearly warranted in finding that appellant was not insane at the time of the criminal episodes involved here on August 9 and August 10, 1980.

The jewelry store robbery was apparently planned well in advance. On August 8, 1980, appellant stole a Tennessee license plate from a Memphis resident. He apparently taped this over the Arkansas plate on the rear of his vehicle, but later it was found inside his automobile after he had removed it. He changed clothes after the robbery and was dressed in a different costume at the time of the subsequent police chase. After the murders he shaved his beard and altered his appearance considerably. He had capacity obviously to book plane flights from Memphis to Birmingham

and thence to Florida. A lady acquaintance with whom he stayed in Florida and who had known him for several months prior to the crimes involved here testified that he had not used drugs excessively during the times when he was with her, nor did he appear to be experiencing withdrawal symptoms or using drugs when he returned to Florida on August 12, 1980. A police officer who examined him in Florida and took hair samples from his body said that there were no visible needle marks or other external evidences of drug abuse on appellant's body.

All of the items taken by appellant in the jewelry store robbery were found in his abandoned automobile, together with some $2,400 in cash and a very large quantity of contraband controlled substances.

We do not deem it necessary to dwell further upon the factual background of the case, because the evidence is overwhelmingly sufficient to sustain the convictions on all of the charges. Indeed, as previously stated, appellant has admitted guilt of all of them, but has denied responsibility solely on the basis of lack of mental capacity. It was stipulated that there was no issue of self-defense in connection with the deaths of the Todds, both of whom were repeatedly beaten about the head until they died. Defensive wounds appeared on the arms and hands of both of them, and the bodies had apparently been moved or dragged to points inside the house where they would not be visible from either the front or the rear door. Appellant made a telephone call from the residence of the Todds to his sister in Chicago at 3:45 on August 10, 1980. In addition he gave the following information to one of his expert witnesses in undertaking to

explain the homicides:

> "He described that he was at their house with the agenda of getting cleaned up, getting fed, so that he could flee the area. And in the course of his time there they ceased to cooperate with him, and he started to try to control them physically to cooperate, and that's all the detail I have. He has no more recollection of specifics after that.
>
> "Q. But there's no question that he told you that he did kill those two old people?
>
> "A. That's what he told me, yes.
>
> "Q. And they ceased to cooperate with him, is that what you said he told you. Right?
>
> "A. They became frightened, and that was not what he wanted them to do."

Other testimony indicated that the police had combed the area in which the Todds lived and in which the other shootings had occurred on Saturday afternoon, and that appellant had apparently concealed himself from them. They had even used tear gas on an abandoned residence in an effort to find him. There can be no question but that his killing of the Todds was in furtherance of his effort to escape from the crimes which he had committed on the previous day.

Appellant was thirty-three years of age. He was an honor graduate of the University of Arkansas and shortly before the events in question here had been accepted for admission into law school, scoring in the ninety-sixth percentile on a law school admission test. He had served in the armed forces from 1966 through 1969, and had one year's service in Viet Nam as a supply sergeant. He had received a bronze star for his service there and had been honorably discharged from the army. He went to college after his discharge. In 1972, however, after graduating from college, he was convicted of three separate armed robberies in Oklahoma, these covering a period from December 1971 through

May 1972. He had been imprisoned in Oklahoma until the latter part of 1979. He had then returned briefly to his home in Arkansas and had gone to Hawaii for a time. The vehicle which he was driving on August 9, 1980 had originally been registered in his name, but was registered in the name of his mother on that date.

Appellant offered the testimony of two witnesses in support of his defense of lack of mental competence.[1] The first of these was Dr. Matthew Jaremko, a clinical psychologist at the University of Mississippi. He had interviewed appellant on two occasions for a total of about six hours, beginning in February 1982, less than two months prior to the trial. It was the opinion of Dr. Jaremko that appellant was suffering from post-traumatic stress disorder as a result of his experiences in Viet Nam, and that upon this was superimposed a serious drug-abuse disorder. Dr. Jonathan Lipman, a neuropharmacologist, testified that appellant, in his opinion, suffered from "chronic amphetamine psychosis" as a result of serious drug abuse. As previously stated, neither of these witnesses had ever known or treated appellant prior to the early part of 1982, and both of them based their testimony entirely upon what he told them as to the extent of his ingestion or injection of drugs. Not only was the weight of their testimony a question for the jury, but appellant's known pattern of conduct immediately before and immediately after the events in question here raised serious doubts as to the accuracy of their opinions, because he did not appear to be seriously under the influence of or experiencing withdrawal from drugs according to the testimony of several witnesses who saw him during August 1980. In addition, as previously

[1] Other than claiming his constitutional right to remain silent, appellant did not testify at either the guilt or the sentencing phase of the trial.

pointed out, the State offered two witnesses whose qualifications equalled or exceeded those of appellant's experts, and neither of the State's expert witnesses found any basis for an insanity defense.

Counsel for appellant, who conducted the defense and has pursued the appeal in this case most diligently, has raised numerous issues for our consideration. After carefully considering them, however, we are of the opinion that none of them warrant our interference with the jury verdict and the judgment of the trial court rendered thereon. In addition to overruling the issues presented as to the sufficiency of the evidence, we will comment briefly upon the other issues raised on appeal, although not necessarily in the order presented in the briefs.

Appellant has assigned error upon the failure of the trial court to grant individual voir dire of a juror, Floreine C. Dragon. This juror indicated that she was taking some medication at the time of the trial. Defense counsel requested that the other prospective jurors be sequestered so that he could examine the juror individually and avoid embarrasing her. The trial court denied this request, and we are of the opinion that this ruling was within his discretion. There was nothing necessarily embarrassing in questioning the juror about her medication as a part of the group. She apparently served on the jury without difficulty or incident. At one point during the trial she was questioned privately, as were other jurors, concerning some newspaper materials which had been furnished to the jury during a weekend recess. Nothing in her testimony at that time or in any post-trial affidavit indicates that she was not competent to serve as a juror or that appellant was prejudiced in any way by the ruling of the trial judge

with respect to her voir dire examination.

Error is also assigned on the voir dire examination of five other persons who were excused by the trial judge for cause when they expressed irrevocable and unconditional refusal to consider the imposition of the death penalty. We have reviewed carefully the examination of each of these prospective jurors, and in our opinion the trial judge acted properly in excusing them. See Houston v. State, 593 S.W.2d 267, 272 (Tenn. 1980).

During a weekend recess of the lengthy trial, a court officer furnished members of the jury with a Sunday newspaper. He had clipped from this all news stories which he observed concerning the trial and its incidents. However, in the sports section, there was a story about one of the witnesses who had been shot by appellant on August 9, 1980. In a magazine story there was also a brief reference to a double murder of an elderly couple in mid-town Memphis. This was merely a passing reference which did not refer to the names of the victims or of appellant.

The trial judge conducted an individual examination of the jurors on their exposure to the magazine article. Only one juror had even read that article, and none of the jurors had read anything in the newspaper which they associated in any way with the case on trial. They were not separately examined about the article on the sports page, but apparently none of them had taken note of it or were affected by it in any way. In all events, that article simply recounted the testimony of a witness, John Douglas Clark, who had testified on the previous Friday. It contained nothing with which the jurors were not already fully familiar. We find no error

in connection with the ruling of the trial judge and agree that a mistrial was not justified upon the basis of these news items.

A number of issues are presented concerning rulings made by the trial judge during the course of the trial. One of these involved an objection by counsel for appellant to the cross-examination of Dr. Lipman. That witness testified that all he knew about appellant's history was what appellant had told him. He admitted on cross-examination that if appellant had given different information to other doctors, this might affect his opinion. Apparently appellant did give other information to the State's expert witnesses, or they obtained other information independently, because their opinions differed greatly from that expressed by Dr. Lipman. The cross-examination was properly permitted. Further, the trial judge properly allowed the expert witnesses called by the State to testify concerning statements made to them by the accused with reference to his use of drugs. Neither witness quoted any incriminating statements by appellant, insofar as the facts of the case were concerned. At two points in the record references were made to the fact that these witnesses had examined appellant upon orders of the court. We find no statement, however, that they were "the Court's doctors," as alleged in the brief of appellant. The issue is without merit.

Equally without merit is the contention that the trial judge permitted three witnesses to testify for the State on rebuttal. It was insisted by appellant that these witnesses should have been offered during the State's presentation in chief. All of them, however, directly and sharply

contradicted the contention of appellant that he was "out of his mind" as a result of drug abuse on the weekend in question, and that he was experiencing severe and extreme symptoms of drug withdrawal after the crimes for which he was on trial.

Error is assigned upon the admission of photographs of the homicide victims. The trial judge excluded all photographs which showed the facial features of the two deceased persons in any detail. The photographs which were admitted simply showed portions of the house, and in some of them the bodies of the victims could be seen, but none of the photographs was gruesome nor did the prejudicial effect of any outweigh its probative value.

Counsel for appellant insists that the prosecuting attorney made an improper reference to a motion in limine which had been ruled upon by the trial judge. That motion involved some of the photographs just discussed. When counsel for the prosecution reached the point in trial when he wished to introduce photographs of the Todd residence, he mentioned to the court that he was coming to material which had been the subject of the pre-trial motion. At that point the judge excused the jury. The conduct of counsel for the prosecution was entirely proper. There was no attempt to suggest to the jury what the subject of the pre-trial motion had been or the ruling of the court thereon. The assignment is overruled.

There are numerous other assignments in which counsel for appellant insists that the prosecuting attorneys were guilty of improper conduct in the presence of the jury. We have examined each of these, and find none of them to warrant reversal. One improper remark was made, as to which the trial judge offered to give curative instructions to the

jury. Counsel for appellant declined these. In our opinion no remarks made during the course of the trial concerning counsel for either side could possibly have affected the results. The same is true with respect to alleged improper argument by counsel for the State. One or two brief comments were made in the heat of argument which probably should not have been made, but these either were not objected to at the time or were legitimate inferences to be drawn from the proof. We accordingly overrule issues two, three and six as presented in appellant's brief.

We find no merit to the assertion by appellant that the indictments in this case were insufficient and find no error with respect to the jury instructions. Likewise we find without merit the insistence that the State failed properly to produce witness statements for use by counsel for appellant on cross-examination. The State produced all of the statements which it had. The reference by counsel for appellant simply has to do with some summaries of witness interviews made in a general police report. There is no showing that any of the witnesses referred to ever saw or adopted any of the materials contained in this report. Issues seven, fourteen and fifteen are overruled.

We find no substance to the contention that the State was guilty of improper or selective prosecution in this case by not offering a life sentence to the accused in pre-trial negotiations. We also overrule four issues addressed to the alleged invalidity of the death penalty in this state. All of these contentions have been considered in depth by this Court in numerous reported decisions, and they do not warrant further discussion here. See generally State v. Austin,

618 S.W.2d 738 (Tenn. 1981); State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981); Houston v. State, 593 S.W.2d 267 (Tenn. 1980).

The final issue presented by appellant is whether a new sentencing hearing is justified because of insufficiency of the evidence to support one of the aggravating circumstances found by the jury. After careful consideration we are of the opinion that if any error was committed by the jury, it was harmless beyond a reasonable doubt in view of multiple aggravating circumstances which were clearly established.

In the guilt phase of the case the jury found that appellant was guilty of murder in the first degree as a matter of common law and also of felony-murder in the perpetration of burglary. The latter, in itself, is one of the statutory aggravating circumstances warranting the death penalty. T.C.A. § 39-2-203(i)(7). In reporting aggravating circumstances at the end of the sentencing hearing, however, the jury did not repeat this particular circumstance although it is abundantly established by the evidence. The jury did find, however, three other aggravating circumstances which were clearly shown by the evidence. The first of these was that the accused had previously been convicted of one or more felonies involving the use or threat of violence to the person. T.C.A. § 39-2-203(i)(2). As mentioned previously, it was proved that appellant had been convicted of three separate armed robberies in Oklahoma in 1982.

The jury also found that the murders in question were especially heinous, atrocious, or cruel in that they involved torture or depravity of mind as provided in T.C.A. § 39-2-203(i)(5). The evidence abundantly established that both of the elderly victims had been brutally beaten to

death by multiple crushing blows to the skulls. Blood was spattered throughout the house, and both victims apparently had attempted to resist, because numerous defensive wounds were found on their persons. The only excuse offered in the entire record for this unspeakably brutal conduct by the accused was that these elderly victims had at some point ceased to "cooperate" with him in his ransacking of their home and in his effort to flee from arrest. As previously stated, it was stipulated by counsel for appellant that there was no issue of self-defense even remotely suggested. The deaths of the victims were not instantaneous, and obviously one had to be killed before the other. The terror, fright and horror that these elderly helpless citizens must have endured was certainly something that the jury could have taken into account in finding this aggravating circumstance.

The jury also found that the accused committed the murders for the purpose of preventing a lawful arrest or prosecution, an aggravating circumstance specified in T.C.A. § 39-2-203(i)(6). This circumstance was established not only by the testimony of police officers but by appellant's own statement to his expert witnesses.

It thus appears that four aggravating circumstances were indisputably established by the record, and three of these were reported by the jury at the end of the sentencing hearing. The jury also reported another aggravating circumstance, T.C.A. § 39-2-203(i)(3) as follows:

> "The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder . . . ."

It is clear from the record that on the afternoon of

August 9, 1980, the accused shot two persons and attempted to shoot a third in escaping from an armed robbery after a high-speed automobile chase. On the next morning he terrorized Ms. Teuch and some hours later killed Mr. and Mrs. Todd. There is considerable logic and plausibility to the finding of the jury that the acts of murder were committed during the course of an attempted escape from this crime spree, and certainly more than two persons were in danger.

We are of the opinion, however, that generally the statute does not contemplate an extended criminal episode, but contemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based.[2] We are therefore doubtful that the record in the present case sustains the jury verdict as to this aggravating circumstance. Nevertheless, where three others were clearly found by the jury and the record demonstrates a fourth, we are of the opinion that the jury finding with respect to this aggravating circumstance, if erroneous, was harmless beyond a reasonable doubt and does not warrant the granting of a new sentencing hearing. In this respect, the case differs markedly from State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981), in which there were only two aggravating circumstances found and the evidence did not support one of these. In the recent case of State v. Workman, S.W.2d (Tenn. 1984), the Court upheld a death sentence where there was some question as to one of the aggravating circumstances found by the jury. The Court found that the validity of the sentence would not be affected even

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[2]There could be situations where substantial periods of time might be involved, such as in the taking of hostages or the hijacking of a plane or other vehicle. It is unnecessary here to attempt to define all possible fact situations which might be covered by this statute. It was held applicable in State v. Workman, S.W.2d (Tenn. 1984) where an escaping robber killed one police officer and fired at two others.

if the jury had erred as to one circumstance where numerous others were clearly established.

Pursuant to T.C.A. § 39-2-205 we have reviewed the sentence of death in this case and are of the opinion that it is not in any way disproportionate under all of the circumstances, including the brutal murders of two elderly defenseless persons by an escaping armed robber who had terrorized a residential neighborhood for twenty-four hours.

The judgment and sentence are affirmed at the cost of appellant. Unless otherwise ordered by this Court or other proper authority, the sentence will be carried out as provided by law on June 29, 1984.

Justice Brock concurs in affirming the conviction in this case but dissents with respect to the imposition of the death penalty for reasons stated in his dissenting opinion in State v. Dicks, 615 S.W.2d 126, 132 (Tenn. 1981).

William J. Harbison

William J. Harbison, Justice

Fones, C.J., Cooper and Drowota, JJ., concur;
Brock J., partial dissent.

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,

Appellee

VS

JOSEPH GLENN BUCK,

Appellant

For Publication

JAN 30 1984

Smith Criminal

Honorable Robert W. Bradshaw

Judge

FILED

JAN 30 1984

RAMSEY LEATHERS, CLERK
SUPREME COURT

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O P I N I O N

AFFIRMED IN PART;
REVERSED IN PART;
REMANDED FOR RESENTENCING HEARING

WM. H. D. FONES, C.J.

O P I N I O N

This is a direct appeal of a death penalty case. Defendant was convicted of criminal sexual conduct, with sentence of life imprisonment, and murder in the first degree with sentence of death. The jury found three aggravating circumstances, to-wit: subsections (2), (6), and (7) of T.C.A. §39-2-203(i) and no mitigating circumstances. We affirm the conviction of criminal sexual conduct and the sentence. We affirm the conviction of first degree murder but reverse the sentence of death for errors committed during the bifurcated sentencing phase of the trial and remand for a resentencing hearing pursuant to T.C.A. §39-2-203(k).

We begin with a summary of the material facts adduced on the issue of guilt or innocence of murder.

I.

The victim was Tina Rose Craighead, a married teenager, mother of a nineteen month old boy. She worked the 2:00 to 10:00 p.m. shift at a self-service Texaco station located at Seventh and Willow Streets in Cookeville, Putnam County, Tennessee. On February 15, 1979, she was the only employee present on the premises from approximately 3:00 p.m. until her disappearance was reported to the police by a customer about 7:30 p.m. About 9:15 p.m. the Sheriff of Smith County received a report that a blonde woman was lying in the road on Highway 141, just off interstate 40 approximately thirty-five miles west of Cookeville. The blonde woman was Tina Craighead. She had a distinct ligature mark around her neck and the

pathologist testified that the cause of death was ligature strangulation and that it occurred prior to the infliction of extensive traumatic injuries to the entire body. The station manager checked the records and found that $441 in cash was missing.

A tire pattern was impressed upon her socks, blue jeans, and into the skin of her face, scalp, legs, and chest obviously caused by a vehicle running over her body. The scalp was completely torn away from the skull on the left side. She had multiple rib fractures on both sides of the chest and a compound fracture of the left lower leg. The autopsy examination revealed complete disruption of the liver with portions of it in the abdominal cavity. However, the extensive internal injuries resulted in less blood in the abdominal cavity, about one quart, than would have been the case had her death not preceded those injuries, according to the pathologist. Also, he found a fracture of the cornu of the thyroid cartilage, which he testified documented the fact that the ligature strangulation occluded the airway.

Several customers of the station who knew the victim testified to routine purchases and payment to her in the station booth between 7:00 and 7:15 p.m. on February 15, 1979. Two of the witnesses recalled seeing a Renegade jeep with mag wheels in the station during that time-frame and identified pictures of defendant's jeep as similar to the jeep seen on that date. One of those recalled seeing a man that looked like defendant standing behind

the jeep. A third witness who knew defendant and his jeep stopped for the red light at the intersection of Willow and Seventh, looked into the Texaco station and saw defendant standing with his back to his jeep and facing the booth. He observed that defendant was wearing a dark sleeveless jacket and that the jeep was the one he had seen defendant drive on prior occasions. When defendant was brought to Tennessee from Portland, Oregon, where he was arrested, he was wearing a blue, sleeveless down-type vest. A fourth witness entered the station between 7:15 and 7:30 p.m. and filled her car with gas before discovering that no attendant was present. She wrote a note on a check deposit slip advising that she had purchased unleaded gas in the sum of fourteen dollars and that she would be back later to pay with her credit card. She drove about two hundred yards down the street from the station and decided to stop and use a pay phone beside the Tech Food Market to call police. The pay phone was not working but she went inside the Tech Food Market and called the police and reported that no attendant was present at the station.

Defendant's jeep was found in Roseville, Michigan about a week after the murder and was returned to Nashville. Hair samples were removed from the exterior undercarriage of the jeep. The senior microanalysist at the Tennessee Crime Laboratory made a microscopic comparison of separate hair samples taken from the left rear fender flair and the left rear shock mount with the known hair of the victim and found they were similar in racial origin, coloring,

and microscopic structure. Examination of a hair sample taken from the right front seat of the jeep was compared with a known hair sample of the victim, with the same result of compatibility.

All four tires on the jeep were identical in brand, tread and tread wear. The microanalysist compared the pattern on the victim's sock and jeans with a pattern made from the left front tire of the jeep and found them to be identical.

Elizabeth Hood and Robbie Hood were returning home from a basketball tournament in Carthage when they came upon a jeep sitting on the right side of Highway 141, just off I-40 with the right tail light burning and the left tail light out. The jeep moved down the road a short distance as the Hood vehicle approached and then pulled further over and parked. The jeep had plastic window curtains and neither Elizabeth nor Robbie Hood was able to see how many persons were in the vehicle.

Ann Hood West, Robbie Hood's daughter, left Carthage in her own car ten to fifteen minutes after Robbie. She saw a jeep parked at approximately the same place on Highway 141 as described by Elizabeth and Robbie Hood. As she approached the jeep she could see an object in the left lane of the road that could have been a body. The jeep pulled out in front of her at a high rate of speed and although she was going in the same direction at a good speed, it soon disappeared into the night. She

also noticed that the left tail light on the jeep was out.

Elizabeth and Robbie Hood and Ann West saw defendant's jeep at the Tennessee Crime Lab after it was brought there from Michigan and identified it as the same or a similar vehicle that they saw after 8:00 p.m., February 15, 1979, on Highway 141 near the John Lancaster home. The left tail light was out when they examined it at the crime lab.

A left thumb print was lifted from the door to the cashier's booth of the station the night the victim was murdered. It was later identified by a fingerprint expert from the Tennessee Crime Laboratory as defendant's.

Defendant was arrested by F.B.I. agents in Portland, Oregon on October 23, 1979. He was using the name of Ernest William Hinton, a friend of his who lived in Roseville, Michigan. Defendant was fully advised of his rights, signed a waiver and agreed to talk to Agent James Russell without a lawyer. He told Russell that he knew he was wanted for murdering a young woman in Tennessee but that he did not murder her and knew nothing about it. Defendant told the agent that he left Tennessee because he had stolen $250 from two students who attended Tennessee Tech that he had met at Hunter's Bar in Cookeville. Defendant related that the two young men asked him if he knew where they could buy marijuana or grass. He responded that if they had two hundred and fifty dollars he knew where to buy what they wanted; that he did not think they

would have that much money but they did and he agreed to take them to buy marijuana; that they left the bar in defendant's jeep, leaving the student's car; that he drove off and on the interstate several times pretending to find the place to buy marijuana, until the student in the back fell asleep and the other one said they had to go to the dorm; that he took them to the dorm but told them that if they would give him the two hundred fifty dollars he would get the stuff and deliver it to them and that they did give him the money. He was unable to give the agent the names of the students or where the dorm was located or its name.

Defendant continued with his story of that evening's events by further relating that he dropped the students off about 7:00 p.m., went to Pam's Restaurant and ordered hamburgers and french fries to go and then went home to his wife Diane who was pregnant; that he told his wife about getting two hundred and fifty dollars from the students and for that reason did not want to stay at their home that night; that they went to his brother's house in Jackson County to spend the night; that he arrived at his house from Pam's Restaurant between 7:30 and 8:00 p.m., left about 8:30 p.m. and arrived at his brother's house at 9:30 to 10:00 p.m.; that he and his wife were planning to move to Michigan and he decided to leave the next morning with his wife to follow later; that he drove his wife to his mother's house about 7:00 a.m. on February 16, left her there and departed for Michigan.

Agent Russell testified that he told defendant that hair had been found underneath his jeep and asked him why he ran over the young woman after he strangled her. Defendant repeated his denial of any involvement in the murder. Defendant's wife and daughter were staying with him at the motel in Portland where he was arrested, although they were not present at the time of his arrest. Russell asked defendant if he loved his wife and daughter and he responded affirmatively. He was then told that if he used his wife as an alibi witness and she lied for him that he could possibly be subjecting her to a charge of perjury or being an accessory after the fact of murder. According to Russell it was then that defendant admitted that the story he had told about getting the two hundred and fifty dollars from the students was a lie made up to justify leaving Tennessee after the murder; that defendant admitted that he robbed, kidnapped, raped and murdered the station attendant; that he then told what happened that night which Agent Russell wrote out in the form of a statement that defendant read and signed. The statement was admitted into evidence at the trial.

Defendant's statement related that he used the mouth of a beer bottle concealed under his vest to resemble the barrel of a gun to order the victim to give him the money from the station cash drawer and then to get into the jeep with him; that he drove west on I-40 to the Carthage exit, then south about ten miles where he forced Tina to have intercourse with him; that after they finished she told him he was sick and crazy, that she was going to

tell her husband and, "he would get me." Defendant said he wanted to shut her up so he put his arm around her throat and squeezed and she seemed to black out; that he saw the headlights of a car coming, opened the passenger door and pushed her out and drove away to the south before the car arrived; that the money taken from the station was about four hundred dollars. The statement also related that the victim had taken her jeans and panties off and when she put her jeans back on she left her panties off and that defendant threw them out the window somewhere along the interstate. When the victim's body was found she had on jeans but no underpants.

Russell questioned defendant further and he denied using any type of ligature to strangle the victim and insisted that he was not aware that he had run over her.

At trial defendant asserted that the statement he gave Agent Russell in Portland was involuntary and coerced by the threat of prosecution of his wife. In his testimony at trial defendant rejected the facts in the statement which he signed, as coming from him, and testified that those facts were the product of Agent Russell's information received from Tennessee authorities.

Defendant's testimony at trial, wherein he related his activities on the night of the murder, was similar to the first story he told Russell in Portland. However, there was a significant difference. He had told Russell that he went from a dormitory at Tennessee Tech

where he dropped the students, to Pam's Restaurant for hamburgers and french fries and then home to his wife. At trial he inserted a visit to the Texaco station where Tina worked, around 7:00 p.m., no doubt to account for his thumb print on the pay booth door and the presence of his jeep which several witnesses had seen. He went into great detail at trial explaining everything he did concerning the pumping and paying for five dollars worth of gas. He said that, "I always went to the door when I paid at that gas station," instead of the pay window and expressly said that he opened the door. He testified that he went from the station to Pam's Restaurant and the remainder of the story was not significantly different from the first one that he told Russell in Portland.

Defendant presented witnesses who saw two men in a van at the Texaco station that were said to be acting suspiciously. Another witness said she heard female screams from the station while the van was there and it was shown that the victim's husband remarried soon after the murder. It would be charitable to characterize defendant's proof, attempting to cast suspicion elsewhere, as presenting a scintilla of evidence in support of his innocence.

We find the evidence sufficient to convince any rational trier of fact of the guilt of Joe Glen Buck of the premeditated murder of Tina Craighead, fully satisfying the standard prescribed in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979) and T.R.A.P. 13(e).

II.

Errors were committed during the sentencing phase of the bifurcated trial in this case that require reversal of the death penalty and remand for a resentencing hearing.

The State relied upon the following aggravating circumstances set forth in T.C.A. §39-2-203(i):

> (2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person;
>
> . . . .
>
> (6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;
>
> (7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;
>
> . . . .

In support of aggravating circumstance number (2) the State produced a witness, Buddy Franklin, a Cookeville businessman who testified that he caught defendant trying to break into his place of business, the Lucky B Manufacturing Company, a wholesale parts distributing company. He testified that he was on the way to dinner one night and as he passed his business he thought he saw something unusual. He turned around, went back and found defendant crouched down at a window, that was later found to have been pried almost open with a crowbar like instrument.

He chased defendant approximately a half mile, caught him and turned him over to the sheriff. Later Franklin asked the sheriff what had happened to the charges against defendant and was told that "this other deal has come up." Franklin testified that the attempted break-in occurred a short time before the murder of Tina Craighead.

David Andrews, an investigator for the Putnam County Sheriff was then called and testified that he took a statement from defendant about the incident involving the Lucky B Manufacturing Company and the statement was offered and admitted into evidence.

Defendant objected to the testimony of both Franklin and Andrews and the admission of defendant's statement on the grounds of lack of materiality being based upon "something which he has not been charged nor convicted of." The trial judge overruled the objection. In this Court, defendant adds the objection that the State failed to list the names of Franklin and Andrews as witnesses and failed to furnish a copy of the statement defendant gave Andrews as required by T.R.Crim.P. 16, in response to defendant's pre-trial motion for discovery. The State's response insists that defendant has waived appellate review because the objection was not made on the grounds of "relevancy" nor did defendant object at trial on the grounds that he was not furnished the names of the witnesses for the statement pursuant to his discovery motion.

Our reading of the record reveals that defendant

raised all of those objections in the course of the testimony of Franklin and Andrews. Almost immediately after Andrews took the witness stand the following occurred:

> MR. BELLAR: Your Honor, again, I object to this witness testifying to anything because his name has not been furnished to defense counsel.
>
> GEN. YELTON: I didn't know we were under any furnishing rule at this point in time.
>
> THE COURT: I don't think we are. Would counsel approach the bench?
>
> (Thereupon a bench conference was held on the record, but out of the hearing of the jury, when the following proceedings were had, to-wit:)
>
> THE COURT: I thought you said he was charged with this.
>
> GEN. YELTON: I thought he was too. We had the statement.
>
> GEN. THOMPSON: The only reason he wasn't was because of this.
>
> MR. DANCE: In any event, he wasn't.
>
> GEN. YELTON: That don't change it a bit. I have an eye-witness of him trying to break in a place. I have a statement or his explanation which is as ridiculous as the other one he gave.
>
> THE COURT: All right.
>
> MR. BELLAR: Note the exception.

The trial judge was in error in allowing Franklin and Andrews to testify and was also in error in implicitly sustaining the prosecution in its claim that Rule 16 and discovery rules were not applicable to the sentencing hearing.

We recently held in State, v. Adkins, 653 S.W.2d 708 (Tenn.1983), that it was reversible error to permit

the State to present evidence at the sentencing hearing that an indictment was then pending against the defendant, charging aggravated assault with a twenty-two caliber pistol; that under the clear language of aggravating circumstance (i)(2) it is only convictions, not mere accusations that are relevant, in accord with the mandate of Cozzolino v. State, 584 S.W.2d 765 (Tenn.1979). The excuse of the district attorney that defendant had not been "charged" with and perhaps the implication that he had not been "convicted" because of the intervention of the murder provided no justification whatsoever for the admission of an accusation of an attempted break-in of a business house.

T.B.I. Agent Moore was permitted, over objection, to testify as to defendant's prior criminal record based upon an uncertified copy of a "computer print-out" received through the mail from the National Crime Information Center [N.C.I.C.]. Moore was asked to tell what the N.C.I.C. was and responded as follows:

> A The National Crime Information Center is where police agencies can request information and is a consolidation of what little I know about it - - -
>
> Q Is it the F.B.I. or Department of Justice?
>
> A Yes.

Defendant objected to the introduction of the report, "based on the reasons stated in chambers." The record does not disclose the reasons stated in chambers.

Agent Moore read the contents of the report into the record in the presence of the jury. Nine arrests were listed in the report and presumably where applicable, each arrest report contained a section designated "court data" and a section designated "custody data." The entire report is in computer jargon with abbreviations that are not found in the dictionary but are presumably known to police officials. The bottom of each page carries the following notation:

> OFFICIAL USE ONLY -- Arrest data based on fingerprint identification by submitting agency or F.B.I.

We will deal with arrest number one later.

Arrest number two on 4/30/70 in Roseville, Michigan -- charged with simple assault. Court data -- simple assault. Convicted 5/22/70, thirty days confinement. Later the State introduced a certified copy of the record from the Thirty-Ninth District Court of MaComb County, Michigan, that reported the charge as "assault and battery." This conviction was not admissible in support of aggravating circumstance (i)(2) because it was not a felony.

Arrest number three on 5/16/74 by the Roseville Michigan Police Department. Charged with "agg asslt -- pol off," does not reveal any court action or other disposition. Later, the State introduced a certified copy of a one sheet record from the Thirty Ninth District Court of MaComb County, Michigan, that reflected a charge

of "assault police officer," the name of defendant's attorney, a plea of not guilty entered and bond set at one hundred dollars. After some illegible handwriting, the last entry on the page, dated 7/3/74 reads "exam held bound over to circuit court bond cont'd." That incident was not admissible because there was no conviction and it was not a felony.

Arrest number four on 5/17/74 by MaComb County, Michigan authorities for parole violation showed a court disposition of dismissal and was not admissible in evidence in this case.

Arrest number five on 9/10/74 in Mount Clemens, Michigan for simple assault. Court data -- conviction, fine of eleven dollars. That incident was not a felony and not admissible in evidence and very likely did not involve the use of threat or violence to the person.

Arrest number six on 11/6/74 in Harper Woods, Michigan. Charge -- indecent exposure. Court data -- convicted, fined two hundred dollars and (other provisions). A certified copy from the Municipal Court of the City of Harper Woods showed the charge on the corresponding date as disorderly person, to-wit: indecent exposure, a two hundred dollar fine and a sixty day suspended sentence. That incident was not a felony, nor did it involve the use or threat of violence to the person.

Arrest number seven on the N.C.I.C. report involved a thirty-eight dollar fine for indecent exposure

in Nashville. Arrest number eight was a Nashville charge of making a false report that was dismissed. Arrest number nine was another Nashville arrest, on 10/25/75, for the offense of "flight to avoid -- UFAP -- from MI." None of those three incidents were admissible.

We hold that computer print-outs from the N.C.I.C. are not admissible as a substitute for certified copies of court convictions nor for any other purpose. The information in such reports is pure hearsay, of a dubious degree of accuracy, prepared for purposes other than court use, contains information that is likely to be prejudicial under all circumstances and is not the best evidence of matters that can be proven by reliable, documentary evidence.

The State argues that the "rap" sheet and the information thereon was admissible under T.C.A. §39-2-203(c), "to establish that the defendant had a significant history of prior criminal activity." The State's brief in this Court relies on Cozzolino v. State, supra for the proposition that the prosecution may rebut, in its proof-in-chief, the assumption that defendant will contend that he had no significant history of prior criminal activity. The majority opinion in Cozzolino held that one cannot rebut a proposition that has not been advanced. It was the dissenting opinion that held that the Legislature did not intend such a technical meaning of the word "rebut." Also, the State asserts that defendant took the stand during the guilt phase of the trial, was asked on

direct if he had been convicted in Michigan of assault with intent to commit rape and responded affirmatively; that by stopping without revealing his entire criminal record "defendant invited the use of rebuttal proof to negate the favorable impression which may have been created thereby." The Michigan assault to rape conviction was described, not entirely accurately, on the N.C.I.C. report as arrest number one. A certified copy of the court record was properly received in evidence at the sentencing hearing, that showed a conviction on two counts, forcible rape and assault with intent to rape with sentence of five years minimum, ten years maximum. Defendant did not represent directly or indirectly that he had no other criminal record and we do not agree with the State that defendant created an implication from his voluntary admission of the assault to rape charge that he had no additional criminal involvement. The fact is that while he has had "prior criminal activity" the only incident properly admissible, as this case was tried, was the certified copy of the forcible rape and assault with intent to rape conviction.

In giving the charge at the conclusion of the sentencing phase of the trial, the trial judge read to the jury the entire statutory language[1] setting out the twelve aggravating circumstances[2] and the entire verbage of the

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[1] With the exception of (i)(7) which will be discussed later.

[2] At a conference in chambers just prior to delivery of the charge, the trial judge said that he had serious doubts as to why he should read all of the aggravating circumstances but if requested that he would do so. The prosecutors responded that they were relying on two, six and seven, but added that "it can't hurt anything to read them all."

eight mitigating circumstances. He had prefaced that reading with an admonition to the jury that some portions would have application and others would not and that it would be up to the jury to determine which sections to apply. The trial judge was in error in charging the jury in that manner. It was his duty to determine which of the aggravating circumstances had been raised by the evidence and thus should be submitted to the jury for its determination as to whether the State had proved beyond a reasonable doubt each aggravating circumstance so submitted. Of course, his duty was the same with respect to the mitigating circumstances raised by the evidence. The aggravating circumstances and mitigating circumstances which were not raised by the evidence should not have been mentioned in the charge. That is the meaning of the mandate in T.C.A. §39-2-203(e) that

> [t]he trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both. (Emphasis added.)

In State v. Pritchett, 621 S.W.2d 127 (Tenn.1981), we applied that rule to the single aggravating circumstance (i)(7) when we held it was error to read to the jury every felony listed in the subsection when the State had offered proof only on one felony, robbery. In Pritchett and in State v. Moore, 614 S.W.2d 348 (Tenn.1981), we held that the trial judge must also charge the statutory definition of the felony or felonies the State relies upon for submission

to the jury under aggravating circumstances (i)(7).

The trial judge's charge of aggravating circumstance (i)(7) omitted the portion of the subsection enclosed in parenthesis as follows:

> (7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, (any first degree murder, ~~arson~~, rape, robbery,) burglary, larceny, kdinapping, aircraft piracy, or unlawful ~~throwing~~, placing or discharging of a destructive device or bomb; [Court's parenthesis.]

The form signed by the jurors in returning their verdict finding defendant guilty of aggravating circumstance number seven contained exactly the same omission. The omission of rape and robbery and other circumstances point to the inevitable conclusion that the omission was a typographical error in both instances that was overlooked by the trial judge. The felonies raised by the evidence in this case were rape, robbery and kidnapping. The charge of (i)(7) should have been limited to those felonies and each of them should have been defined. See State v. Pritchett, supra and State v. Moore, supra.

We quote from the record a portion of the district attorney's closing argument:

> The jury can either vote life imprisonment or death by electrocution. If the jury is hung, then it is automatically life imprisonment . . .
>
> MR. DANCE: Objection, Your Honor.
>
> THE COURT: Overruled.

T.C.A. §39-2-203(h) expressly prohibits the judge and the attorneys from informing the jury on the effect of their failure to agree on a punishment. Further, defendant asserts that the trial judge specifically instructed all counsel just before argument[3] not to violate that statutory prohibition and the prosecution has not denied that assertion.

We approve of the factors adopted by the Court of Criminal Appeals in Judge v. State, 539 S.W.2d 340 (Tenn.Crim. App.1976), to be considered in determining whether prosecutorial misconduct has affected the verdict to the prejudice of defendant and consequently amounts to reversible error. Those factors are "(1) the conduct complained of viewed in context and in light of the facts and circumstances of the case; (2) the curative measures undertaken by the Court and the prosecution; (3) the intent of the prosecutor in making the improper statement; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case." Id. at 344.

The deliberate act of the prosecutor, sanctioned by the trial judge in the presence of the jury, and magnified by its cumulative effect when considered along with the other errors noted herein, requires a finding by this Court

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[3] The record does not disclose this admonition but does show the following occurred immediately before the argument began:

> THE COURT: I would like to see counsel in chambers for just a minute. This doesn't need to be on the record, Miss Jane.

of reversible error. However, it is only fair and accurate to add that the cumulative errors discussed above also would require a finding of reversible error in the conduct of the sentencing phase of this trial had the prosecutor's misconduct not occurred.

III.

Defendant contends that with respect to the conviction of criminal sexual conduct the State failed to establish the corpus delicti, independent of defendant's statement, that there was no evidence whatsoever to corroborate the confession and establish that the crime of rape had been committed.

The pathologist testified that he found no sperm in, or trauma to, the victim's vagina, anus or mouth. Defendant insists that that testimony leaves the State with no evidence, circumstantial or otherwise, that the crime of rape actually occurred.

The applicable law was stated in Ashby v. State, 124 Tenn. 684, 139 S.W.2d 872 (1911), and has been affirmed in identical language many times. See e.g. Nichols v. State, 200 Tenn. 65, 289 S.W.2d 849 (1956), and Ricketts v. State, 192 Tenn. 649, 241 S.W.2d 604 (1951). Mr. Justice Neil, writing for the Court in Ashby said:

> "The rule upon this subject, as announced by the later authorities, and the great weight of authority, is that, while the corpus delicti cannot be established by confessions alone, yet the confessions may be taken in connection with other evidence, direct or circumstantial, corroborating them, and, if from all

> of the evidence so considered together the corpus delicti and the guilt of the person with reference thereto is established beyond a reasonable doubt, it is the duty of the jury to convict."
>
> 124 Tenn. at 697-98, 139 S.W.2d at

When the victim's body was found she was wearing jeans and she was not wearing panties, exactly as stated by defendant in his confession. The fact that her jeans were unzipped provides some circumstantial corroboration. There was independent evidence that defendant forced Tina to accompany him in his jeep after he had taken $441 in cash at the station and that he drove approximately thirty miles down the interstate to a lonely state road where his jeep was seen parked. Those circumstances point unerringly to the single motivation that defendant's only purpose in kidnapping Tina was to perpetrate the crime of rape. We find no merit in that issue.

IV.

Defendant insists that the jury panel, grand and petit, were improperly selected. Our reading of the proof on that issue leads us to the conclusion that no identifiable group was substantially under-represented and that defendant was indicted and tried by jurors that reflected a fair cross section of the community. We have found no violation of the three-prong test in Duren v. Missouri, 437 U.S. 357, 99 S.Ct. 664 (1979).

Defendant raises a number of issues involving the trial judge's conduct of the voir dire examination,

excusing certain jurors for cause, failing to excuse certain jurors for cause, rehabilitating certain jurors and failing to adhere to Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968), in excusing jurors. We have read the transcript of the voir dire and carefully considered all of the alleged errors involving the selection of the petit jury and found them to be without merit.

V.

Defendant contends that the statement he gave Agent Russell should have been suppressed because he was unlawfully arrested and because it was coerced.

Defendant does not assert that probable cause was lacking for the arrest but predicates his claim upon the fact that F.B.I. agents did not have physical custody of the Federal Fugitive Warrant that had been issued in Nashville, charging him with unlawful flight to avoid prosecution for murder, at the time of his arrest in Portland, Oregon. The existence of the warrant had been made known to Russell and the Portland office of the F.B.I. by teletype.

In Roynica v. State, 54 Ala.App. 436, 309 So.2d 475 (1969), cert. denied 423 U.S. 858, 96 S.Ct. 111, the defendant asserted that his arrest by F.B.I. agents in California acting on a teletype message from Alabama that a warrant had been issued charging him with unlawful flight to avoid prosecution for murder, was defective because the agents did not have physical possession of the

federal warrant in California. The Alabama court held that the agent had lawful authority to arrest defendant having determined that a valid warrant had been issued in Alabama. The United Stated Supreme Court denied defendant's application for certiorari.

Defendant's basis for the assertion that his confession was coerced is his claim that he made the statement to protect his wife from prosecution. Agent Russell testified that all that he told defendant was that if he used his wife as an alibi witness he could possibly be subjecting her to a perjury sentence if she lied for him. Defendant testified that the agents told him that they had agents at the motel where his wife was and they would pick her up and put her in jail; but that they told him the minute he changed his story they would call them off. Defendant admitted on cross examination that the F.B.I. agents in Portland were fair to him, did not beat him or threaten him. Russell testified that defendant's wife was not taken into custody at any time nor was any threat made to arrest her. Our review is limited to a determination of whether the defendant has carried the burden of showing that the evidence preponderated against the finding of the trial judge that the confession was freely and voluntarily given. Monts v. State, 218 Tenn. 31, 400 S.W.2d 722 (1966). Defendant has failed to carry that burden and we find this issue to be without merit.

VI.

Defendant contends that his jeep was the subject of an illegal seizure and search when it was taken into custody at defendant's parent's home in Roseville, Michigan and removed to the Roseville Police Department. It was taken into custody without a warrant but was not searched until a warrant was obtained. The trial judge held that defendant's mother, Marlene Buck, consented to the seizure. However, we prefer to rest the validity of the seizure and the later search upon a warrant, on the substantial evidence that the Tennessee officers had prior to that seizure of the involvement of defendant and his Renegade jeep in the murder of Tina Craighead, which information had been transmitted to the Roseville officers by teletype. When the Roseville officers went to the Buck home they saw the jeep parked in the rear and learned that defendant was not present but would be back. Clearly, there was evidence to support a finding that the vehicle could have been moved during the time that would have been required for the Roseville officers to obtain a warrant. Such exigent circumstances justify the seizure and holding of an automobile until a warrant to search it can be obtained and that was the procedure that was carried out in this case. See Chambers v. Maroney, 399 U.S. 42, 40 S.Ct. 1975 (1970). This issue is without merit.

We have carefully considered all of the remaining issues presented in the exhaustive brief on behalf of defendant and found them to be without merit.

The convictions of murder in the first degree and criminal sexual conduct are affirmed. The sentence of life imprisonment for criminal sexual conduct is affirmed, but the sentence of death is reversed and this case is remanded to the Smith County Criminal Court for a resentencing procedure pursuant to T.C.A. §39-2-203(k) and consistent with the rulings herein.

Costs are adjudged against defendant.

Wm. H. D. Fones,
Chief Justice

Concur:

Cooper, Harbison, Drowota, JJ.

Brock, J.--concurs in part, dissents in part
(see separate opinion)

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,

Appellee,

v.

JOSEPH GLENN BUCK,

Appellant.

Smith Criminal

Hon. Robert W. Bradshaw

Judge

FILED

JAN 30 1984

RALPH HIVERS, CLERK
SUPREME COURT

OPINION CONCURRING IN PART;
DISSENTING IN PART

I concur in the opinion of the Court in all respects except the constitutionality of the death penalty. With respect to the constitutionality of the death penalty, I adhere to the views expressed in my dissenting opinion in State v. Dicks, Tenn., 615 S.W.2d 126 (1981).

Gary L. Brock, J.

BROCK, J.

SENTENCING PHASE - MURDER FIRST DEGREE

Ladies and Gentlemen of the Jury, you have now found the defendant guilty beyond a reasonable doubt of Murder in the First Degree as charged in count 1 & 2 of indictment number 83470 & 83747.03

It is now your duty to determine within the limits prescribed by law, the penalty which shall be imposed as punishment for this offense. Section 39-2402, Sub-section (b), Tennessee Code Annotated, provides that a person convicted of Murder in the First Degree shall be punished by death or by imprisonment for life.

In arriving at this determination, you are authorized to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilt finding phase or the sentencing phase or both. The Jury are the sole judges of the facts, and of the law as it applies to the facts in the case. In making up your verdict, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.

The burden of proof is upon the State to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt to a moral certainty.

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty is not demanded by the law but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the verdict. The law makes you, the Jury, the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence.

Section 39-2404, Subsection (i), Tennessee Code Annotated, provides that no death penalty shall be imposed by a Jury but upon a unanimous finding of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

1. The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age or older.

2. The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use of threat or violence to the person.

   Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear.

3. The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.

4. The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.

5. The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

   "Heinous" means extremely wicked or shockingly evil.
   "Atrocious" means outrageously wicked and vile.
   "Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

6. The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

7. The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after commiting or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb. Burglary is the unlawful breaking and entering a dwelling house another with intent to commit a felony there

8. The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.

9. The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or firearm, engaged in the performance of his duties.

10. The murder was committed against any present or former, judge, district attorney general or state attorney general, assistant district attorney general, or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupied said office.

11. The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that

Section 39-2404, Sub-section (j), Tennessee Code Annotated, provides that in arriving at the punishment, the Jury shall consider as heretofore indicated, any mitigating circumstances which shall include but not be limited to the following:

1. The defendant has no significant history of prior criminal activity;

2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

3. The victim was a participant in the defendant's conduct or consented to the act;

4. The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

5. The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

6. The defendant acted under extreme duress or under the substantial domination of another person;

7. The youth or advanced age of the defendant at the time of the crime;

8. The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the State, beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. The Jury shall state in writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify in writing that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found.

You will write your findings and verdict upon the enclosed form attached hereto and made a part of this charge. Your verdict should be as follows:

(1) We, the Jury, unanimously find the following listed statutory aggravating circumstance or circumstances;

(The Jury will then list the statutory aggravating circumstance or circumstances so found beyond a reasonable doubt).

(2) We, the Jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the Jury, unanimously find that the punishment shall be death.

The verdict must be unanimous and each Juror must sign their name beneath the verdict.

If you unanimously determine that no statutory aggravating circumstance has been proved by the State beyond a reasonable doubt; or if the Jury unanimously determine that a statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt; but that said statutory aggravating circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. You will write your verdict upon the enclosed form attached hereto and made a part of this charge.

The verdict should be as follows:

"We, the Jury, unanimously find that the punishment shall be life imprisonment."

The verdict must be unanimous and signed by each Juror.

The Jury in no case, should have any sympathy or prejudice or allow anything but the law and evidence to have any influence upon them in determining their verdict. They should render their verdict with absolute fairness and impartiality as they think truth and justice dictate. Take the case, consider all the evidence fairly and impartially and report your verdicts to the Court.

James C. Blasky

JUDGE

JURIES — CAPITAL PUNISHMENT — "DEATH QUALIFICATION" ▸300.230

In a long opinion that relies heavily on several recent studies of juror attitudes, the U.S. District Court for the Western District of North Carolina holds that the Sixth Amendment forbids exclusion, from the guilt phase of a capital trial, of jurors whose views on capital punishment would not allow them to impose the death penalty but who state they could render a fair decision on guilt or innocence. Like the U.S. District Court for the Eastern District of Arkansas, which reached the same conclusion in Grigsby v. Mabry, 33 CrL 2477 (1983), the court stresses that empirical evidence on the shared attributes of such jurors is much more convincing now than when the Supreme Court decided Witherspoon v. Illinois, 391 U.S. 510 (1968). "That evidence demonstrates that what common sense says is so, is so; jurors who favor the death penalty are significantly more likely to convict and jurors who oppose the death penalty are significantly less likely to convict. There is no serious evidence refuting those two propositions. A fair jury has not been provided when the prosecutor is able to keep on the jury those persons most likely to convict and to exclude from the jury for cause all those persons most likely to acquit. Nor does a jury so constituted represent, even in theory, a representative cross-section of the community. Separate trials on the question of guilt and on the question of punishment should be made available and persons conscientiously objecting to the death penalty may validly be excluded from the second phase, or punishment phase, of the trial. Separate trials on guilt and on punishment are already required by North Carolina. There is no evidence that following these principles will add substantially to the costs already required by North Carolina's split trial procedure. Such costs, if any, are trivial compared with the human rights and constitutional issues at stake." The court orders habeas corpus relief for three condemned state prisoners. (Keeten v. Garrison; USDC WNC, No. C-C-77-193-M, 1/12/84)

83-6490

Office - Supreme Court, U.S.
FILED
MAR 22 1984
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

GARY BRADFORD CONE,

Petitioner,

v. Petition for Writ of Certiorari

STATE OF TENNESSEE,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now your Petitioner, Gary Bradford Cone, by and through his attorney of record, and would move this Honorable Court for leave to proceed in forma pauperis in accordance with 28 U.S.C. §1915, and in support of said motion would say as follows:

1. That Petitioner is unable to pay the costs or give security for the prosecution of this appeal, as evidenced by the Affidavit attached to this motion.

2. That Petitioner has been found to be indigent and had the Public Defender's Office to represent him for purposes of the appeal from the trial court to the Supreme Court of Tennessee.

3. That the same attorney who represented him in the appeal to the Supreme Court of Tennessee is willing to represent him in this appeal, and that he is not being compensated by the petitioner due to his indigency.

WHEREFORE, PREMISES CONSIDERED, petitioner respectfully requests that his Motion For Leave To Proceed In Forma Pauperis be granted.

Respectfully submitted:

JOHN C. DICE
Attorney for Petitioner
100 N. Main #2504
Memphis, TN 38103

IN THE SUPREME COURT OF THE UNITED STATES

GARY BRADFORD CONE

Petitioner,

v. Petition for Writ of Certiorari

STATE OF TENNESSEE

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Gary Bradford Cone, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepary fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Incarcerated at Tennessee State Prison - not employed.

If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. 1969, U.S. Army, $365 a month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

3. Do you own any cash or checking or savings account? No

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Gary Bradford Cone

GARY BRADFORD CONE
Petitioner

SUBSCRIBED AND SWORN TO before me this ~~24th~~ 27th day of March, 1984.

William P Chamberland

NOTARY PUBLIC

Let the applicant proceed without pre-payment of costs or fees or the necessity of giving security therefor.

JUDGE
SUPREME COURT OF THE UNITED STATES

CERTIFICATE

I, John C. Dice, certify that a copy of the foregoing Motion For Leave To Proceed In Forma Pauperis has been mailed this the 27 day of March, 1984, to William Leech, Attorney for Respondent, 450 James Robertson Parkway, Nashville, Tennessee, 37219.

JOHN C. DICE

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 83-6490

GARY BRADFORD CONE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR THE WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM M. LEECH, JR.
Attorney General & Reporter
State of Tennessee

GORDON W. SMITH
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-2379
Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner was denied due process and equal protection by the judgment of the Supreme Court of Tennessee finding harmless error the jury's erroneous finding of an aggravating circumstance at the sentencing hearing; and

2. Whether the petitioner was denied a fair trial as to guilt by a "death qualified" jury.

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OPINION BELOW

The opinion of the Supreme Court of Tennessee is reported at 665 S.W.2d 87.

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. §1257. Respondent submits that this record does not present a substantial federal question. The judgment of the Supreme Court of Tennessee was entered on January 23, 1984.

STATEMENT OF THE CASE

On August 19, 1980, the Shelby County Grand Jury returned two indictments, the first charging the defendant Gary Bradford Cone, with murder in the first degree of Cleopatra Todd in the perpetration of a burglary (count one) and in common law form (count two); the second charging the defendant with murder in the first degree of Shipley O. Todd in the perpetration of a burglary (count one) and in common law form (count two). The offenses were alleged to have been committed on August 10, 1980.

On September 5, 1980, the Shelby County Grand Jury returned four indictments charging the defendant, as follows: assault with intent to commit first-degree murder upon Herschel Dalton, assault with intent to commit first-degree murder upon B.C. Allen, assault with intent to commit first-degree murder upon Douglas Clark, and robbery by use of a deadly weapon upon Aaron Hayes, Jr. The offenses were alleged to have occurred on August 8, 1980.

The six (6) indictments were ordered consolidated for trial on March 25, 1982. The assault and robbery indictments were amended on March 25, 1982, to show that the offenses occurred on August 9, 1980.

On April 12, 1982, jury selection began in Shelby County Criminal court, continued through and was concluded on April 15, 1982.

Following the defendant's plea of not guilty, trial testimony commenced on April 16, 1982, continued through April 17, 19, 20, 21, and 22, and was completed on April 23, 1982. On April 23, 1982, the jury deliberated and found the defendant guilty of murder in the first degree of Cleopatra Todd as charged in both counts of the indictment and murder in the first degree of Shipley O. Todd as charged in both counts of the indictment. The jury further found the defendant guilty of assault with intent to commit first-degree murder upon Herschel Dalton, assault with intent to commit first degree murder upon B.C. Allen, and assault with intent to commit first-degree murder upon Douglas Clark, with punishment fixed at imprisonment in the state penitentiary for not less than ten (10) years nor more than twenty-five (25) years on each count. The jury further found the defendant guilty of robbery by use of a deadly weapon upon Aaron Hayes, Jr., and fixed his punishment at life imprisonment in the state penitentiary.

On that same day, a bifurcated hearing on the issue of punishment for the two first-degree murder convictions was held. The jury deliberated and sentenced the defendant to death for each murder, finding unanimously the following aggravating circumstances: (1) the defendant was previously convicted of one or more felonies, other than the present charge, which involved the use of threats or violence to the

person; (2) the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder; (3) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (4) the murder was committed for the purpose of avoiding, interferring with, or preventing a lawful arrest or prosecution of the defendant or another. The jury found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances so found. The trial judge entered judgment in accordance with the jury's verdict on the same day.

On May 17, 1982, the defendant filed a motion for a judgment of acquittal or, in the alternative, motion for new trial. The trial court denied the motion on June 24, 1982.

On January 23, 1984, the Tennessee Supreme Court affirmed the petitioner's convictions and sentences imposed.

REASONS FOR DENYING THE WRIT

Respondent submits that the Supreme Court of Tennessee correctly affirmed the trial court's judgment. The Supreme Court did not decide a federal question of substance not heretofore determined by this Court or decide such question in a way not in accord with the applicable decisions of this Court; nor did the Supreme Court of Tennessee decide a federal question in a way in conflict with another court of last resort or of a federal court of appeals. See Supreme Court Rule 17.1. There being no special and important reasons for a grant of certiorari in this case, the Court in its sound discretion should deny the writ sought here.

ARGUMENT

I.

THE SUPREME COURT OF TENNESSEE CORRECTLY APPLIED THE HARMLESS ERROR RULE TO THE JURY'S ERRONEOUS FINDING OF AN AGGRAVATING CIRCUMSTANCE.

The jury found the following four statutory aggravating circumstances:

> (1) the defendant was previously convicted of one or more felonies, other than the present charge, which involved the use of threats or violence of the person;
>
> (2) the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder;
>
> (3) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and
>
> (4) the murder was committed for the purpose of avoiding, interferring with, or preventing a lawful arrest or prosecution of the defendant or another.

The jury found no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances so found.

In addition to the four aggravating factors specifically found by the jury, a fifth (the murder was committed during the perpetration of a felony) was clearly applicable, since the jury found the petitioner guilty of felony murder in the perpetration of burglary. Tenn. Code Ann. §39-2-203(i)(7).

The Supreme Court of Tennessee, in reviewing the petitioner's death sentence as required by statute, Tenn. Code Ann. §39-2-205(c), determined that the evidence probably was not sufficient to sustain the jury's finding

that the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder. However, in view of the jury's finding of three other statutory aggravating circumstances supported by the evidence, the clear presence of another such circumstance not specifically found by the jury, and the absence of any mitigating circumstances, the Court determined that any error was harmless beyond a reasonable doubt. 665 S.W.2d at 95.

There was nothing to prevent the Tennessee Supreme Court from applying the harmless error analysis to this case. See Barclay v. Florida, ____ U.S. ____, 103 S. Ct. 3418, ____ L.Ed.2d ____ (1983). Moreover, the Tennessee Supreme Court has not applied the harmless error analysis inconsistently in prior or subsequent cases. The Court explicitly distinguished State v. Pritchett, 621 S.W.2d 27, 39 (Tenn. 1983), in which the Court was unable to apply the analysis where the proof was insufficient to support one of two aggravating circumstances. 665 S.W.2d at 95. See also State v. Moore, 614 S.W.2d 348, 351-352 (Tenn. 1981) (holding harmless error analysis inappropriate where proof insufficient to support one of two aggravating circumstances). Contrary to petitioner's contention, the case of State v. Buck does not evidence inconsistent application of the harmless error analysis. The reversible error found in Buck was the admission of inadmissible evidence to support an aggravating cirtcumstance, not the insufficiency of proof of the circumstance. Moreover, there were other independent grounds for reviewing the death sentence in Buck, i.e., the use of hearsay evidence to establish prior convictions, an incorrect jury charge[1], and the improper

---

[1] The petitioner notes that the jury in the instant case was given a similar incorrect charge. However, this issue was not raised by the petitioner in the state courts. Furthermore, a mere error of state law is not a denial of due process. Engle v. Isaac, 456 U.S. 107, 121 n.21, 102 S.

closing argument of the prosecutor. There is no showing of a denial of due process or equal protection in this case. The respondent submits that the petitioner's contention on this issue does not merit the granting of certiorari.

II.

THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S CONTENTION THAT HE WAS DENIED A FAIR TRIAL BY THE EXCUSAL OF SEVERAL PROSPECTIVE JURORS FOR CAUSE.

On direct appeal to the Tennessee Supreme Court, the petitioner challenged the excusal for cause of five prospective jurors during voir dire, contending that they were improperly excused because of their religious scruples against the death penalty. The Tennessee Supreme Court rejected the claim, finding that those jurors expressed irrevocable and unconditional refusal to consider the imposition of the death penalty. 665 S.W.2d at 92. The record supports that finding. Accordingly, those jurors were properly excused for cause. Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968); Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). The respondent submits that this issue does not warrant the granting of certiorari.

For the first time, the petitioner now contends that he was denied a fair trial as to guilt because a jury from which jurors unalterably opposed to capital punishment have been excluded is "death-prone" and, therefore, "guilt-prone." This Court has rejected such a contention as a matter of law:

> We simply cannot conclude, on the basis of the record now before us or as a

Ct. 1558 n.21, 71 L. Ed. 2d 783 (1982).

> matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction.

Witherspoon v. Illinois, 391 U.S. 510, 517-518, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968). There is no evidence in the instant record that this particular jury was "guilt-prone." Absent some proof, it must be assumed that the jurors were carefully selected and the resultant jury was fair and impartial on all issues. The respondent submits that this allegation does not merit the granting of certiorari.

CONCLUSION

For these reasons, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief has been forwarded by first-class mail, postage pre-paid to, Mr. John C. Dice, Attorney for the Petitioner, 100 North Main #2504, Memphis, Tennessee 38103 on this the 25th day of April, 1984. I further certify that all parties have been served.

GORDON W. SMITH
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